

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Kathleen Ann Thornberry,

Debtor.

Chapter 7

BK 02-32159

Habbo G. Fokkena, United States Trustee

Plaintiff,

Adv. No. 04-3029

vs.

Kathleen Ann Thornberry,

Defendant.

MOTION FOR SUMMARY JUDGMENT

COMES NOW, the United States Trustee, through his undersigned attorney, and moves for summary judgment pursuant to Fed. R. Bankr. P. 7056. In support of his motion, he states the following:

1. A hearing has been scheduled on this matter on September 22, 2004, at 11:30 a.m. before the United States Bankruptcy Court, Courtroom No. 228B, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

2. Any response to this motion must be filed and delivered not later than September 17, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than September 13, 2004, which is

seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

3. This motion arises under FED. R. BANKR. P. 7056; FED. R. CIV. P. 56; Local Bankruptcy Rules 7007-1; 9013-1; 9013-2; 9006-1 and 9017-1. The underlying complaint filed by the United States Trustee arose under 11 U.S.C. § 727(d)(3) and (a)(6) and FED. R. BANKR. P. 4004(c). This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The United States Trustee requests that the Bankruptcy Court grant summary judgment as a matter of law.

4. The defendant debtor is a resident of the State of Minnesota.

5. The defendant debtor filed the underlying chapter 7 bankruptcy case on June 7, 2002. Nauni Manty is the chapter 7 trustee appointed in this case. A discharge was granted on September 10, 2002.

6. On January 26, 2004, the United States Trustee's complaint objecting to discharge was filed with the Bankruptcy Court and this adversary proceeding was initiated.

7. The complaint alleged that the defendant debtor failed to comply with a Bankruptcy Court order dated September 3, 2003.

8. The September 3, 2003 Order directed the debtor to turnover the following to the chapter 7 trustee:

1. 2001 and 2002 state and federal tax returns.
2. \$ 500.00 payable to the chapter 7 for attorney's fees.
9. The defendant debtor filed an answer, which admitted and/or did not deny the

allegations in the complaint, but requested that the Court not revoke the discharge because the defendant debtor waiting for the tax returns to be completed.

10. On May 4, 2004, the Bankruptcy Court held a Scheduling Conference in this adversary proceeding.

11. At the conference, the plaintiff and defendant debtor reached the following agreement:

- a. the debtor would provide copies of her 2001 and 2002 tax returns;
- b. the debtor would pay \$ 500.00 to the chapter 7 trustee;
- c. If the debtor failed to accomplish (a) and (b) above, within thirty (30) days of May 4, 2004, the United States Trustee would move for summary judgment.

12. Upon information and belief, the debtor submitted the 2001 and 2002 tax returns and that the debtor paid \$ 250.00 of the \$ 500.00 attorney fee to the chapter 7 trustee in early June 2004.^{1/}

See Att. Exhibit. The debtor had requested another month to make the remaining \$ 250.00 payment.

13. As of this date, the remaining attorney fee payment subject to the September 3, 2003 Order has not been made. *See Att. Exhibit.*

14. The debtor has failed to fully comply with the Court Order dated September 3, 2003.

15. There is no material issue of fact in this case.

16. The debtor has refused to obey a lawful court order, which is an act specified under 11

^{1/} The tax returns do show refunds. Upon information and belief, the debtor has made a representation that she is turning over those refunds to the estate, which is not relevant to this complaint.

U.S.C. § 727(a)(6)(A). Accordingly, a basis exists to revoke the defendant debtor's discharge in the underlying bankruptcy case under 11 U.S.C. § 727(d)(3).

17. If the debtor turns over the final \$ 250.00 payment to the chapter 7 trustee required under the September 3, 2003 Order prior to the hearing date, the United States Trustee will agree to stipulate to dismissal of the adversary proceeding.

WHEREFORE, the United States Trustee requests that the Bankruptcy Court enter summary judgment revoking the defendant debtor's discharge in bankruptcy case number 02-32159.

Dated: July 14, 2004

Respectfully submitted,
HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
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(612) 664-5500

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AFFIDAVIT OF SARAH J. WENCIL

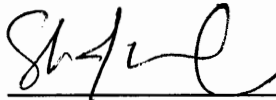
I declare under penalty of perjury the following:

1. I am a trial attorney for the United States Trustee and am representing his interests in this matter.
2. On May 4, 2004, I attended the status conference in this adversary proceeding and at that conference, the parties reached the following settlement:
 - a. The debtor would submit the 2001 and 2002 tax returns to the chapter 7 trustee and provide a copy to the United States Trustee.
 - b. The debtor would remit \$ 500.00 to the chapter 7 trustee.
 - c. If the debtor failed to accomplish a and b within thirty (30) days, the United States Trustee would move for summary judgment.
3. In early June 2004, the United States Trustee's Office received a copy of the debtor's 2001 and 2002 tax returns.
4. On June 3, I communicated with the chapter 7 trustee and/or her staff to determine whether that office had received the tax returns and whether the debtor had paid the attorney fee required under the September 3, 2004 letter.

5. The chapter 7 trustee's office indicated that the debtor paid \$ 250.00 to the chapter 7 trustee and that the debtor indicated that she was going to pay the other half the next month, which the office later clarified to me meant July 31, 2004.
6. The chapter 7 trustee's office indicated that the debtor provided her 2001 and 2002 tax returns.
7. Debtor's counsel copied me on a letter dated May 6, 2004, which indicated that the debtor would make the remaining \$ 250.00 payment on June 20, 2004.
8. At the end of June 2004, the chapter 7 trustee's office advised me that they believed the remaining \$ 250.00 payment would be made sometime in July 2004.
9. On approximately August 3, 2004, the chapter 7 trustee's office advised me that the status of the case had not changed and that the debtor failed to pay the remaining balance in July 2004.
10. Approximately at this time, I contacted debtor's counsel to see what the status of the case was.
11. As of the date of this affidavit, the status of the matter has not changed, and the debtor has not paid the remaining \$ 250.00 due under the Court order dated September 3, 2003.
12. I contacted debtor's counsel towards the end of August 2004, to request that he try to contact the debtor again. Debtor's counsel indicated that a letter was sent to the debtor regarding this matter.

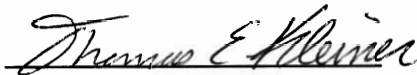
This concludes my affidavit.

Dated: August 31, 2004

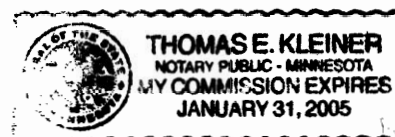


Sarah J. Wencil
Trial Attorney

Subscribed and Sworn before Me in the County of Hennepin on the 31st day of August, 2004.



Notary Public



**UNITED STATES BANKRUPTCY COURT
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Plaintiff,

Adv. No. 04-3029

vs.

Kathleen Ann Thornberry,

Defendant.

MEMORANDUM OF LAW

The United States Trustee submits this Memorandum of Law in support of his motion for summary judgment.

PROCEDURAL STANDARDS

The standard for a motion for summary judgment pursuant to Bankruptcy Rule 7056(c) and Federal Rule 56(c) provides in part as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c); FED. R. CIV. P. 56(c) (emphasis added).

The burden is on the moving party to show that no genuine dispute exists on a material fact, *City of Mt. Pleasant, Iowa v. Association Electric Corp.*, 838 F.2d 268, 273 (8th Cir. 1988), and once this burden is met, the non-moving party must show that there is genuine dispute over a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548 (1986). When evaluating the motion, inferences drawn from the underlying facts are to be decided in the light most favorable to the non-moving party. *United States v. Diebold*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1976).

"[T]he burden on the moving party may be discharged by 'showing' ... that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In addition, a failure by the nonmoving party to submit evidence to support its claims will result in summary judgment being entered against him. *Metro North State Bank v. Gaskin*, 34 F.3d 589 (8th Cir. 1994) (refusing to overturn the entry of summary judgments by a district court where nonmoving party failed to submit evidence in support of its claim). The facts and circumstances relied upon to avoid summary judgment must "attain the dignity of substantial evidence and not be such merely as to create a suspicion." *Krause v. Perryman*, 827 F.2d 346, 350 (8th Cir. 1987). *See also Rasmussen v. Unruh (In re Unruh)*, 278 B.R. 796, 799-800 (Bankr. D. Minn. 2002) (O'Brien, J.).

ARGUMENT

The United States Trustee filed his complaint to revoke the defendant debtor's discharge in the underlying bankruptcy case pursuant to 11 U.S.C. § 727(d)(3), which provides: "On request of the trustee...or the United States trustee, and after notice and a hearing, the court shall revoke a discharge

granted under subsection (a) of this section if -- (3) the debtor committed an act specified in subsection (a)(6) of this section." Subsection (a)(6) of Section 727 provides: "the debtor has refused, in the case -- (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify."

In this case, there is no material issue of fact as to the elements of Section 727(d)(3).

- The defendant debtor was granted a discharge in the underlying bankruptcy case on September 10, 2002.
- The Bankruptcy Court issued a lawful Order on September 3, 2003.
- The defendant debtor failed to comply with the September 3, 2003 Order by failing to submit \$ 250.00 of the \$ 500.00 in attorney fees awarded to the trustee in the September 3, 2003 Order.
- Failing to comply with the September 3, 2003 Order is an act specified under 11 U.S.C. § 726(a)(6).

The defendant debtor's Answer does not dispute any of the elements of 11 U.S.C. § 727(d)(3). The Answer provides that the debtor obtained professionals to complete her records and that she would turn them over when completed.

The parties agreed at the May 4, 2004 status conference that the debtor's progress in obtaining the tax returns was a reasonable basis to enter into a settlement which provided that the debtor would turnover the tax returns and pay the \$ 500 in attorney fees required under September 3, 2003 Order within 30 days, or the United States Trustee would move for summary judgment.

As it happened, the debtor turned over the tax returns and paid ½ of the \$ 500.00 in early June

2004, leaving \$ 250.00 due under the September 3, 2004 Order. The United States Trustee delayed his portion of moving for summary judgment in the expectation that the debtor would make the final payment in July 2004. In August 2004, he contacted counsel for the debtor and waited to see if the contact would result in the payment. Finally, the United States Trustee has decided that the debtor has had significant extra time under the settlement reached at the status conference and is moving for summary judgment in this case under 11 U.S.C. § 727(d)(3).

Conclusion

The defendant debtor has refused to obey the September 3, 2003 Order by failing to turn over the final \$ 250 of the \$ 500 attorney fee award to the Chapter 7 Trustee. The refusal to obey a lawful court order is an act under 11 U.S.C. § 727(a)(6). A basis exists to revoke the defendant's discharge in this case under 11 U.S.C. § 727(d)(3) for committing an act specified under 11 U.S.C. § 727(a)(6).

Dated: August 31, 2004

Respectfully submitted,
HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT**

At St. Paul, Minnesota the _____ day of _____, 2004, in the above named adversary proceeding pursuant to 11 U.S.C. § 727(d)(3), the United States Trustee's Motion for Summary Judgment pursuant to FED. R. BANKR. P. 7056 came before the undersigned.

Based upon the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and arguments of parties on the record, the Bankruptcy Court finds that there is no genuine issue as to any material fact and the United States Trustee is entitled to judgement as a matter of law. In accordance with its findings, the Bankruptcy Court enters the following Findings of Fact, Conclusions of Law, and Order for Judgment:

Findings of Fact

1. The defendant debtor, Kathleen Ann Thornberry, was granted a discharge in the underlying bankruptcy case (Bankr. No. 02-32159) on September 10, 2002.
2. The Bankruptcy Court issued a lawful Order in the underlying bankruptcy case on September 3, 2003.
3. The defendant debtor failed to comply with the September 3, 2003 Order by failing to submit the final \$ 250.00 of the \$ 500.00 attorney fee award pursuant to the Order.

Conclusions of Law

The failure to comply with the September 3, 2003 Order is an act specified in 11 U.S.C. § 727(a)(6), and therefore, a basis exists as a matter of law to revoke the debtor's discharge under 11 U.S.C. § 727(d)(3).

Order for Judgment

IT IS HEREBY ORDERED: the discharge granted in bankruptcy case number 02-32159 is revoked. LET JUDGMENT BE ENTERED ACCORDINGLY.

Chief Judge Gregory F. Kishel
United States Bankruptcy Judge

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UNSWORN CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Trustee for the District of Minnesota and is a person of such age and discretion as to be competent to serve papers.

That on August 31, 2004, she served a copy of the attached: Motion for Summary Judgement, Memorandum of Law and proposed Findings of Fact, Conclusions of Law and Order for Judgement, by placing said copies in a postpaid envelope addressed to the person(s), herein after named, at the place and address stated below, which are the last known addresses, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.



Office of the United States Trustee
Cheri LeVair

Addressees:

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